

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Pat. No.: 7,600,201

Issued: October 6, 2009

Appln. No.: 10/820,979

Applicants: Endler et al.

Filed: April 7, 2004

Title: METHODS AND APPARATUSES FOR
VIEWING CHOICES AND MAKING
SELECTIONS

Examiner: Steven B. Theriault

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12/4/2009 /Hillary A. McGonegle 59738/

Date Hillary A. McGonegle
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Attorney for Applicants

APPLICATION FOR PATENT TERM ADJUSTMENT

UNDER 37 C.F.R. § 1.705(d)

Hon. Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

Reconsideration is respectfully requested of the Patent Term Adjustment indicated on the front page of this issued patent of 423 days in respect of the above-identified application and now issued patent. Applicants respectfully submit that the Patent Term Adjustment should

be 495 days under 37 C.F.R. §§ 1.703-1.705 and 35 U.S.C. § 154(b) since the Patent Term Adjustment improperly overlaps A period delay with B period delay, instead of adding such delays.

Response to Applicant's application for patent term adjustment under 37 C.F.R. § 1.705(b) states that a decision is being held in abeyance until after the actual issue date. Applicant was given two months from the issue date of the patent to file a written request for reconsideration of the patent term adjustment under 37 C.F.R. § 1.705(d).

As an initial matter, Applicants respectfully point out that, as shown in the attached AIPA Term Calculation Report, the period beginning on the date on which a request for continued examination of the application (RCE) was filed and ending on the date the patent was issued was not included in Applicant's previous application for patent term adjustment when determining the credit due for failure to issue the patent within three years (B period delay of 72 days C.F.R. § 1.703(b)). The B period of delay is equal to 72 days, as determined by crediting the days exceeding three years in the time period between the April 7, 2004 filing date to a June 19, 2007 filing of an RCE (see Row M on page 6). Therefore, knowledge of the actual date the patent issued was not required to calculate the amount of additional patent term entitled to Applicants.

Reference is made to 35 U.S.C. § 154(b)(2)(A) (the "Actual Delay" limitation). The statute limits Patent Term Adjustment where USPTO delays overlap: "To the extent that periods of delay specified in paragraph (1) overlap, the period of any adjustment granted under this subsection shall not exceed the actual number of days the issuance of the patent was delayed." 35 U.S.C. § 154(b)(2)(A). **Granting either the greater of the A period (i.e., delay under 35 U.S.C. § 154(b)(1)(A)(i) and 35 U.S.C. § 154(b)(1)(C)(iii)) or the B period (i.e., delay under 35 U.S.C. § 154(b)(1)(B)) is not in accordance with the statute and the patentee is due a term extension in an amount equal to the A period plus the B period, except for any actual overlap between the two periods.** The B period begins when the USPTO has failed to issue a patent within three years, not before. In calculating these two periods, computation of the A period begins at 14 months following the filing date and calculation of the B period begins at three years following the filing date.

Thus, computing the patent term adjustment consistent with 35 USC

154(b)(2)(A), Applicants respectfully submit that the patent term adjustment should be 495 days.

The present application was filed April 7, 2004. As supported by the attached AIPA Term Calculation Report, the A period delay of 37 C.F.R. § 1.703(a) is equal to 497 days (see Row A on page 2, and Row R on page 6). The B period delay of 37 C.F.R. § 1.703(b) is equal to 72 days (see Row B on page 2). The period of actual overlap of the A period delay and the B period delay is 0 days (see page 6). Thus, the non-overlapping portion of the A period delay and the B period delay is 569 days (see page 6). Applicants have delayed a total of 74 days under 37 C.F.R. § 1.704 (see page 6). The attached AIPA Term Calculation Report is calculated consistent with 35 U.S.C. § 154(b)(2)(A). Thus, the patent term adjustment should be 495 days (457+40+72-32-31-11 days), not 423 days as printed on the front page of this issued patent.

This patent application is not subject to a terminal disclaimer.

This application for patent term adjustment is timely filed no later than two months from the issue date of the patent under 37 C.F.R. § 1.705(d).

According to 37 C.F.R. § 1.705(b)(1), the fee of 37 C.F.R. § 1.18(e) is provided herewith.

Respectfully submitted,

/Hillary A. McGonegle 59738/

Dated: 12/4/2009

Hillary A. McGonegle
Reg. No. 59,738
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Attachment: AIPA Term Calculation Report (7 pages)

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AIPA Term Calculation Report

APPLICATION INFORMATION

Docket Number:	81490 7114	User Name:	Pomiak, Natalie
Application Number:	10/820,979	Firm/Company Name:	Fitch Even Tabin & Flannery
Filing Date:	04/07/2004	User Comments:	
Title/Inventor(s):	METHODS AND APPARATUSES FOR VIEWING CHOICES AND MAKING SELECTIONS; Sean Christopher Endler, San Francisco, CA (US)	Calculation Generated:	12/01/2009 04:10:22 PM ET

AIPA TERM CALCULATION SUMMARY

Earliest Referenced Application under 35 USC § 120, 121, or 365(c):	04 / 07 / 2004
Filing Date (US National Application):	04 / 07 / 2004
Net Adjustment Credits:	569 Days
Net Adjustment Debits:	74 Days
Patent Term Adjustment:	495 Days
AIPA Patent Term End Date:	08 / 15 / 2025 (1)

(1) Assumes payment of all maintenance fees, no intervening acts, and no 35 USC 156 regulatory extensions. Terminal disclaimer(s) filed in this case, if any, may result in an earlier term end date. Without adjustment, the term would end on 04/07/2024.

COMPARISON TO USPTO PAIR PTA TAB (2)

(Based on PAIR Data from 11/18/2009)

	PAIR PTA Tab	Your Calculation	Comparison
Credit Days (USPTO Delay):	497	569	x
Debit Days (Applicant Delay):	74	74	Match
Total Patent Term Adjustment Days:	423	495	x

(2) Comparison is shown for USPTO Delay, Applicant Delay, and Total Patent Term Adjustment fields displayed on USPTO PAIR Patent Term Adjustments (PTA) tab on 11/18/2009. See the full PAIR PTA tab, file wrapper (e.g., Notice of Allowance, PTA-related petitions), and issued patent for complete information on USPTO-calculated PTA.

RULE CALCULATION SUMMARY (3)

Event	Rule Invoked	Related Event	Exclusion Days (4)	Debit Days (5)	Credit Days (6)
A 04/07/2004 Filing Date under 35 USC 111(a) (US National Application)	<u>14-Month PTO First Action</u> PTO must mail a notification under 35 USC 132 or a notice of allowance under 35 USC 151 not later than 14 months after the date on which the application was filed under 35 USC 111(a) or fulfilled the requirements of 35 USC 371 in an international application. Period of adjustment (credits) begins on the day after the date that is 14 months after the date on which the application was filed under 35 USC 111(a) or fulfilled the requirements of 35 USC 371 and ending on the date of mailing of either an action under 35 USC 132, or a notice of allowance under 35 USC 151, whichever occurs first. 35 USC 154(b)(1)(A)(i); 37 CFR 1.702(a)(1), 1.703(a)(1).	<i>First PTO Action:</i> 09/07/2006 Non-final Action			457
B 04/07/2004 Filing Date under 35 USC 111(a) (US National Application)	<u>3-Year PTO Issue of Patent</u> PTO must issue a patent within 3 years (not including exclusions) after the date on which the application was filed under 35 USC 111(a) or the national stage commenced under 35 USC 371(b) or (f) in an international application. Period of adjustment (credits) begins on the day after the date that is 3 years after the date on which the application was filed under 35 U.S.C. 111(a) or the national stage commenced under 35 USC 371(b) or (f) in an international application and ending on the date a patent was issued, but not including the sum of the listed exclusionary periods. 35 USC 154(b)(1)(B); 37 CFR 1.702(b), 1.703(b). You have elected to analyze this rule without applying the USPTO 37 CFR § 1.703(f) Actual Delay limitation in determining Credit Days under this rule. This is consistent with DC District Court ruling in Wyeth et al. v. Dudas, No. 07-1492 (D.D.C. September 30, 2008).	<i>Issue Date:</i> 10/06/2009 Issue Date			72
C 06/21/2004 Notice to File Missing Parts (nonprovisional application)	<u>3-Month Applicant Response to Notice or Action</u> Period of adjustment (credits) shall be reduced for the period in excess of 3 months taken to reply to any PTO notice or action making any rejection, objection, argument, or other request, beginning on the day after the date that is 3 months after the date of mailing or transmission of the Office communication and ending on the date the reply was filed. The period, or shortened statutory period, for reply set in the action or notice has no effect on this deadline. 35 USC 154 (b)(2)(C)(ii); 37 CFR 1.704(b). Where applicant shows, in spite of all due care, applicant was unable to respond within the 3-month period, all or part of adjustment may be reinstated for up to 3 additional months. 35 USC 154(b)(3)(C); 37 CFR 1.705(c). You have indicated that no 1.705(c) Showing of Due Care was made.	<i>Applicant Response:</i> 08/11/2004 Filing Fee Payment (Original or Supplemental)			0

		<u>3-Month Applicant Response to Notice or Action</u>			
D	09/07/2006 Non-final Action	<p>Period of adjustment (credits) shall be reduced for the period in excess of 3 months taken to reply to any PTO notice or action making any rejection, objection, argument, or other request, beginning on the day after the date that is 3 months after the date of mailing or transmission of the Office communication and ending on the date the reply was filed. The period, or shortened statutory period, for reply set in the action or notice has no effect on this deadline. 35 USC 154 (b)(2)(C)(ii); 37 CFR 1.704(b).</p> <p>Where applicant shows, in spite of all due care, applicant was unable to respond within the 3-month period, all or part of adjustment may be reinstated for up to 3 additional months. 35 USC 154(b)(3)(C); 37 CFR 1.705(c).</p> <p>You have indicated that no 1.705(c) Showing of Due Care was made.</p>	<i>Applicant Response:</i> 01/08/2007 Reply after Non-final Action under 37 CFR 1.111		32
E	01/08/2007 Reply after Non-final Action under 37 CFR 1.111	<u>4-Month PTO Response to Applicant Reply</u>	<i>PTO Response:</i> 03/21/2007 Final Rejection		0
F	03/21/2007 Final Rejection	<u>3-Month Applicant Response to Notice or Action</u> <p>Period of adjustment (credits) shall be reduced for the period in excess of 3 months taken to reply to any PTO notice or action making any rejection, objection, argument, or other request, beginning on the day after the date that is 3 months after the date of mailing or transmission of the Office communication and ending on the date the reply was filed. The period, or shortened statutory period, for reply set in the action or notice has no effect on this deadline. 35 USC 154 (b)(2)(C)(ii); 37 CFR 1.704(b).</p> <p>Where applicant shows, in spite of all due care, applicant was unable to respond within the 3-month period, all or part of adjustment may be reinstated for up to 3 additional months. 35 USC 154(b)(3)(C); 37 CFR 1.705(c).</p> <p>You have indicated that no 1.705(c) Showing of Due Care was made.</p>	<i>Applicant Response:</i> 06/19/2007 Request for Continued Examination under 35 U.S.C. 132(b)		0
G	06/19/2007 Request for Continued Examination under 35 U.S.C. 132(b)	<u>4-Month PTO Response to Applicant Reply</u>	<i>PTO Response:</i> 08/09/2007 Non-final Action		0

H	06/19/2007 Request for Continued Examination under 35 U.S.C. 132(b)	<p><u>Exclusion for Continued Examination</u></p> <p>3-Year PTO Issue Requirement does not include the period consumed by continued examination of the application under 35 USC 132(b), beginning on the date on which a request for continued examination of the application under 35 USC 132(b) was filed and ending on the date the patent was issued. 35 USC 154(b)(1)(B)(i); 37 CFR 1.702(b)(1), 1.703(b)(1).</p>	<i>Issue Date:</i> 10/06/2009 <i>Issue Date</i>	841	
I	08/09/2007 Non-final Action	<p><u>3-Month Applicant Response to Notice or Action</u></p> <p>Period of adjustment (credits) shall be reduced for the period in excess of 3 months taken to reply to any PTO notice or action making any rejection, objection, argument, or other request, beginning on the day after the date that is 3 months after the date of mailing or transmission of the Office communication and ending on the date the reply was filed. The period, or shortened statutory period, for reply set in the action or notice has no effect on this deadline. 35 USC 154 (b)(2)(C)(ii); 37 CFR 1.704(b).</p> <p>Where applicant shows, in spite of all due care, applicant was unable to respond within the 3-month period, all or part of adjustment may be reinstated for up to 3 additional months. 35 USC 154(b)(3)(C); 37 CFR 1.705(c).</p> <p>You have indicated that no 1.705(c) Showing of Due Care was made.</p>	<i>Applicant Response:</i> 11/09/2007 Reply after Non-final Action under 37 CFR 1.111	0	
J	11/09/2007 Reply after Non-final Action under 37 CFR 1.111	<p><u>4-Month PTO Response to Applicant Reply</u></p> <p>PTO must respond to a reply under 35 USC 132 not later than 4 months after the date on which the reply was filed. The period of adjustment (credits) begins on the day after the date that is 4 months after the date a reply under 37 CFR 1.111 or in compliance with 37 CFR 1.113(c) was filed and ending on the mailing date of either an action under 35 USC 132, or a notice of allowance under 35 USC 151, whichever occurs first. 35 USC 154(b)(1)(A)(ii); 37 CFR 1.702(a)(2), 1.703(a)(2),(3).</p>	<i>PTO Response:</i> 02/07/2008 Final Rejection	0	
K	02/07/2008 Final Rejection	<p><u>3-Month Applicant Response to Notice or Action</u></p> <p>Period of adjustment (credits) shall be reduced for the period in excess of 3 months taken to reply to any PTO notice or action making any rejection, objection, argument, or other request, beginning on the day after the date that is 3 months after the date of mailing or transmission of the Office communication and ending on the date the reply was filed. The period, or shortened statutory period, for reply set in the action or notice has no effect on this deadline. 35 USC 154 (b)(2)(C)(ii); 37 CFR 1.704(b).</p> <p>Where applicant shows, in spite of all due care, applicant was unable to respond within the 3-month period, all or part of adjustment may be reinstated for up to 3 additional months. 35 USC 154(b)(3)(C); 37 CFR 1.705(c).</p> <p>You have indicated that no 1.705(c) Showing of Due Care was made.</p>	<i>Applicant Response:</i> 05/07/2008 Request for Continued Examination under 35 U.S.C. 132(b)	0	

L	05/07/2008 Request for Continued Examination under 35 U.S.C. 132(b)	<u>4-Month PTO Response to Applicant Reply</u> PTO must respond to a reply under 35 USC 132 not later than 4 months after the date on which the reply was filed. The period of adjustment (credits) begins on the day after the date that is 4 months after the date a reply under 37 CFR 1.111 or in compliance with 37 CFR 1.113(c) was filed and ending on the mailing date of either an action under 35 USC 132, or a notice of allowance under 35 USC 151, whichever occurs first. 35 USC 154(b)(1)(A)(ii); 37 CFR 1.702(a)(2), 1.703(a)(2),(3).	<i>PTO Response:</i> 07/21/2008 Non-final Action		0
M	05/07/2008 Request for Continued Examination under 35 U.S.C. 132(b)	<u>Exclusion for Continued Examination</u> 3-Year PTO Issue Requirement does not include the period consumed by continued examination of the application under 35 USC 132(b), beginning on the date on which a request for continued examination of the application under 35 USC 132(b) was filed and ending on the date the patent was issued. 35 USC 154(b)(1)(B)(i); 37 CFR 1.702(b)(1), 1.703(b)(1).	<i>Issue Date:</i> 10/06/2009 Issue Date	518	
N	07/21/2008 Non-final Action	<u>3-Month Applicant Response to Notice or Action</u> Period of adjustment (credits) shall be reduced for the period in excess of 3 months taken to reply to any PTO notice or action making any rejection, objection, argument, or other request, beginning on the day after the date that is 3 months after the date of mailing or transmission of the Office communication and ending on the date the reply was filed. The period, or shortened statutory period, for reply set in the action or notice has no effect on this deadline. 35 USC 154 (b)(2)(C)(ii); 37 CFR 1.704(b). Where applicant shows, in spite of all due care, applicant was unable to respond within the 3-month period, all or part of adjustment may be reinstated for up to 3 additional months. 35 USC 154(b)(3)(C); 37 CFR 1.705(c). You have indicated that no 1.705(c) Showing of Due Care was made.	<i>Applicant Response:</i> 11/21/2008 Reply after Non-final Action under 37 CFR 1.111		31
O	11/21/2008 Reply after Non-final Action under 37 CFR 1.111	<u>4-Month PTO Response to Applicant Reply</u> PTO must respond to a reply under 35 USC 132 not later than 4 months after the date on which the reply was filed. The period of adjustment (credits) begins on the day after the date that is 4 months after the date a reply under 37 CFR 1.111 or in compliance with 37 CFR 1.113(c) was filed and ending on the mailing date of either an action under 35 USC 132, or a notice of allowance under 35 USC 151, whichever occurs first. 35 USC 154(b)(1)(A)(ii); 37 CFR 1.702(a)(2), 1.703(a)(2),(3).	<i>PTO Response:</i> 01/27/2009 Notice of Allowance under 35 USC 151		0

		<u>3-Month Applicant Response to Notice or Action</u>			
P	01/27/2009 Notice of Allowance under 35 USC 151	<p>Period of adjustment (credits) shall be reduced for the period in excess of 3 months taken to reply to any PTO notice or action making any rejection, objection, argument, or other request, beginning on the day after the date that is 3 months after the date of mailing or transmission of the Office communication and ending on the date the reply was filed. The period, or shortened statutory period, for reply set in the action or notice has no effect on this deadline. 35 USC 154 (b)(2)(C)(ii); 37 CFR 1.704(b).</p> <p>Where applicant shows, in spite of all due care, applicant was unable to respond within the 3-month period, all or part of adjustment may be reinstated for up to 3 additional months. 35 USC 154(b)(3)(C); 37 CFR 1.705(c).</p> <p>You have indicated that no 1.705(c) Showing of Due Care was made.</p>	<i>Applicant Response:</i> 04/27/2009 Issue Fee Payment under 35 USC 151	0	
Q	04/03/2009 Amendment after Notice of Allowance under 37 CFR 1.312	<p><u>Amendment or Paper after Notice of Allowance</u></p> <p>Period of adjustment (credits) shall be reduced where applicant submits an amendment under 37 CFR 1.312 or other paper after a notice of allowance has been given or mailed, (i) for the period beginning on the date the amendment or other paper was filed and ending on the mailing date of the Office action or notice in response to the amendment or such other paper; or (ii) 4 months, whichever is less. 37 CFR 1.704(c)(10).</p> <p>You have elected to analyze this rule under the PTO Interpretation. Both interpretations produce the same result.</p>	<i>Notice of Allowance:</i> 01/27/2009 Notice of Allowance under 35 USC 151	11	
R	04/27/2009 Issue Fee Payment under 35 USC 151	<u>4-Month PTO Issue of Patent</u>	<i>Issue Date:</i> 10/06/2009 Issue Date	40	
Total Exclusion, Debit, and Credit Days:			1359	74	569
Overlap Days (7):			518	0	0
Net Exclusion, Debit, and Credit Days:			841	74	569
Patent Term Adjustment Days (8):					495

(3) Calculations of Debit, Credit, and Exclusion Days are determined by the rule assignments, assignments of related events, and analysis options in the Apply Term Rules tab. The patent professional using this system is responsible for reviewing and updating the Apply Term Rules tab to ensure all data is complete, correct, and consistent with their judgment and interpretation of applicable legal authority.

(4) Exclusion Days are periods which are not included in determining the end of the 3-year period after the date on which the application was filed under 35 USC 111(a), or the national stage commenced under 35 USC 371(b) or (f) in an international application, used to determine credits under the 3-Year PTO Issue of Patent rule. See 35 USC 154(b)(1)(B)(i)-(iii); 37 CFR 1.702(b)(1)-(5), 1.703(b)(1)-(4).

(5) Debit Days are days where grounds for reduction of period of adjustment of patent term exist. See, e.g., 37 CFR 1.704. Debit Days are sometimes referred to as Applicant Delay.

(6) Credit Days are days where grounds for adjustment of patent term exist. See, e.g., 37 CFR 1.702, 1.703. Credit Days are sometimes referred to as USPTO Delay.

(7) To the extent credit periods overlap other credit periods, debit periods overlap other debit periods, or exclusion periods overlap other exclusion periods, overlaps are subtracted so that each calendar day generates at most one credit day, one debit day, and one exclusion day.

(8) Patent Term Adjustment Days equals Net Credit Days minus Net Debit Days, but is not less than zero.